

Before the
Federal Communications Commission
Washington, D.C. 20554

ORIGINAL

In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

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NPCR, Inc. d/b/a Nextel Partners)

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Alabama)

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Federal Communications Commission
Office of Secretary

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Florida)

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Georgia)

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the Commonwealth of Pennsylvania)

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Tennessee)

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the Commonwealth of Virginia)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

Nextel Partners of Upstate New York, Inc.)
d/b/a Nextel Partners)

Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of New York)

To: The Commission

NEXTEL PARTNERS' MOTION TO STRIKE

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NPCR, Inc. and Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners (hereinafter, collectively, "Nextel Partners"), by the undersigned attorneys, pursuant to Section 1.41 and 1.115 (d) of the Commission's Rules, 47 C.F.R. § 1.41, hereby file this Motion to Strike against the "Reply to Opposition to Application for Review" filed by the Rural LECs on October 27, 2004 (the "Reply").

In their Reply, the Rural LECs attempt to supplement their Application for Review by adding a new question for review to this proceeding, specifically, whether designating Nextel Partners as an ETC is in the public interest.¹ The Rural LECs did not include this issue in their Application for Review filed September 24, 2004 (the "Application for Review"), which the Rural LECs themselves acknowledge "focused on the broader policy implications of the Bureau's ongoing review of pending ETC petitions"² and not on the specific question of whether Nextel Partners' designation meets the public interest test set forth in *Virginia Cellular*.

Insofar as it seeks to add a new issue to this proceeding, the Reply violates the strictures of section 1.115 (d) of the Commission's rules, 47 C.F.R § 1.115 (d), which requires that an "application for review and any supplemental thereto shall be filed within 30 days" of the release date of the order being challenged. Accordingly, pursuant to established Commission rule and precedent, the Rural LECs' Reply should be stricken.³

¹ See Reply at pp. 2-3.

² Reply at pp. 2, 3.

³ The new issue that the Rural LECs seek to raise in their Reply was fully addressed by Nextel Partners in its filings before the Bureau and was fully resolved by the Bureau's Order in which the Bureau found that designating Nextel Partners as an ETC is in the public interest. The Rural LECs have raised nothing new that was not already addressed by the Bureau. The Rural LECs' belated challenge to the public interest findings of the Bureau would be without merit even if it had been raised timely within the 30-day period allowed under section 1.115 (d).

1. An Application for Review and any Supplement Thereto Must Be Filed Within 30 Days of the Date of the Order Being Challenged.

Section 1.115 (d) of the Commission's rules governing applications for review states clearly that an "application for review and any supplemental thereto shall be filed within 30 days of public notice of [the action challenged], as that date is defined in section 1.4(b)." Pursuant to section 1.4(b) of the Commission's rules, the date of "public notice" of the Order⁴ being challenged in the instant proceeding was August 25, 2004, the release date of the Order. Accordingly, section 1.115 (d) requires that any application for review and any supplemental thereto had to have been filed no later than September 24, 2004, the 30th day after public notice of the Order.

Commission precedent firmly establishes that when an application for review or a supplement thereto is filed beyond the 30th day after public notice, it is late-filed and must be dismissed. The Commission routinely dismisses late-filed supplements as being outside the scope of section 1.115. *See In the Matter of BDPCS, Inc.*, 15 FCC Rcd 17590, 17596 (2000), where the Commission dismissed late filed supplements to an application for review, explaining,

We note here that the First Supplement to the Application for Review and the Second Supplement to the Application for Review are not timely as they are outside the pleading cycle established in Section 1.115 of our rules, which requires Applications for Review and supplements thereto to be filed within 30 days of public notice of the Commission's action on delegated authority.

The Commission will not consider issues raised in a late-filed supplement that were not raised in the application for review. As the Commission has explained, "Filings after this [30-day] time

⁴ *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners Petitions For Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, Pennsylvania, Tennessee, and Virginia, Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Petition For Designation as an eligible Telecommunications Carrier in the State of New York*, CC Docket No. 96-45, DA 04-2667 (rel. August 25, 2004) ("Order"), amended by *Erratum* released September 13, 2004.

period are untimely and are dismissed *without consideration*.”⁵ The Commission also has ruled, in rejecting an attempt to amend an application for review beyond the 30-day period, “we dismiss the amendment and its contents shall not be considered part of the record in this proceeding.”⁶

The Commission will not lightly waive the § 1.115 (d) filing deadline, and has ruled that “[w]aiver of the filing deadline is appropriate, however, *only* where equities so require and no party would be prejudiced thereby.”⁷ Nor will the Commission countenance a party’s belated attempt to supplement an application for review in the course of filing a Reply or a Response to an opposing party’s pleading. In such a situation, the Commission has declared that the party’s “Response, which is essentially a supplement to its Application for Review, is untimely in that it was filed beyond the 30 days allowed for the filing of such pleadings as set forth in 47 C.F.R. § 1.115(d) and no good cause warranting further consideration has been shown.”⁸ Thus, under long-established precedent, the Commission routinely dismisses supplements to applications for review that are filed more than 30 days after the release date of the order being challenged, and the Commission will not consider issues raised in such late-filed supplements.

2. The Rural LEC’s Reply Must be Dismissed as a Late-Filed Supplement Because it Attempts to Raise Issues Not Raised in the Application for Review.

The Rural LEC’s Application for Review focused only on broad policy issues of whether or not the Commission should overturn its recent *Virginia Cellular* decision that adopted new

⁵ *In the Matter of Applications of Transit Mix Concrete and Material Company*, 16 FCC Rcd 15005, 15008-09 (2001) (emphasis added).

⁶ *In the Matter of Certain Cellular Rural Service Area Applications*, 17 FCC Rcd 8508, 8509 (2002).

⁷ *In re Application of Crystal Broadcast Partners*, 11 Fcc Rcd 4680, 4681 (1996) (emphasis added).

⁸ *In re Applications of Carol Sue Bowman; Joseph B. Prater and Joseph Durham, a Partnership, d/b/a Prater & Durham; Heart of Virginia Broadcasting*, 6 FCC Rcd 4723, at n1 (1991).

standards for designation of competitive ETCs, and instead declare a moratorium on all ETC designations pending completion of ongoing general rulemaking efforts that are considering general issues of Universal Service Fund growth and methodology for calculating support. As Nextel Partners correctly observed in its Opposition to the Application for Review (“Opposition”) filed October 12, 2004, the Application for Review did not “challenge any of the substantive findings set forth in the Bureau’s Order, nor [did it] dispute that the Bureau’s Order granting Nextel Partners’ petitions is fully in accord with the Commission’s *Virginia Cellular* standard.”⁹ In fact, it is clear that the Rural LECs did not intend to raise these issues and instead knowingly omitted them, acknowledging in their Application for Review that they were “[s]etting aside ... concerns about the Bureau’s application of the *Virginia Cellular* standards to the Nextel ETC Petitions,” and were instead seeking Commission review only on the broader policy issues noted above.¹⁰

In their Reply, the Rural LECs now attempt to add to this proceeding the very issue that they knowingly chose to omit when they filed their Application for Review. Specifically, they seek to introduce arguments on the issue of whether Nextel Partners demonstrated it meets the requirements for designation as an ETC. The Rural LECs do not however dispute that they failed to include this issue in their Application for Review. To the contrary, the Reply acknowledges that the Application for Review in fact “focused on the broader policy implications of the Bureau’s ongoing review of pending ETC petitions.”¹¹

The Rural LECs’ attempt to supplement their Application for Review with the addition of a new issue after expiration of the 30-day period established under section 1.115 (d) is prohibited

⁹ Opposition at p.3.

¹⁰ Application for Review at p.i.

¹¹ Reply at 2, 3.

under the rules as well as the established Commission precedent discussed above. The Rural LECs have not shown good cause that might warrant waiver of the 30-day filing requirement under section 1.115 (d),¹² and in fact they could not do so since, as discussed above, their omission of this issue from their Application for Review was both knowing and intentional. Moreover, any such waiver of section 1.115 (d) in this case would be inappropriate as it would result in prejudice to Nextel Partners.¹³ Accordingly, the Commission should dismiss the Reply as a late-filed supplement and make clear that the Commission will not consider the new issues raised therein as part of this proceeding.

CONCLUSION

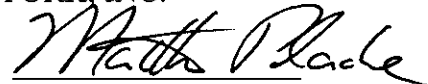
In view of the foregoing, the Commission should dismiss the Reply of the Rural LECs as a late-filed supplement and should make clear that the Commission will not consider as part of this proceeding the new issues raised therein.

Respectfully submitted,

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Date: November 8, 2004

¹² See *Carol Sue Bowman, supra*.

¹³ See *Crystal Broadcast Partners, supra*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of November 2004, copies of the foregoing Motion to Dismiss were sent by first-class U.S. Mail, postage prepaid, to each of the following:

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A handwritten signature in cursive script that reads "Matthew Plache". The signature is written in black ink and is positioned above a horizontal line.

Matthew J. Plache